

PARADIGM SERVICES, LLC

CONTRACT NO. V575P-1632

VABCA-6579

VA MEDICAL CENTER
GRAND JUNCTION, COLORADO

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**OPINION BY ADMINISTRATIVE JUDGE THOMAS
(Pursuant to Rule 12.2)**

The Department of Veterans Affairs Medical Center (VAMC) Grand Junction, Colorado (VA or Government), entered into Contract No. V575P-1632 (Contract) on May 10, 2000, with Paradigm Services, LLC/Holy Cross Energy (Appellant or Paradigm), to supply gas for the period July 1, 2000 through June 30, 2001. (R4, tab 2) Appellant, a marketer and retailer of natural gas services, submitted a claim stating that the bid price included the transmission of the gas to the "city-gate" only and did not include the charges of the local utility or local distribution company's rate to carry the gas to the VAMC. The Contracting Officer (CO) denied the claim. Appellant timely appealed to this Board and elected the Board's Expedited Procedure, Rule 12.2. The parties have waived hearing in this appeal and have elected to submit this matter for decision

on the written record under Rule 11. Both entitlement and quantum are before the Board.

The record consists of the Pleadings, including Notice of Appeal and Request for Use of Optional Small Claims Procedures (Comp.), Appeal File (R4, tabs 1-17), Appellant's affidavit by Ed Degan (Degan Aff.) and Government's Position Paper. Neither party filed a brief.

FINDINGS OF FACT

Solicitation No. 575-512-00 requested offers for the furnishing of all necessary labor, materials, tools, equipment, and incidentals to supply and deliver natural gas to the gas meter located at Building 9 on the grounds of the VAMC. (R4, tab 2) The pertinent terms of the Solicitation/Contract are as follows:

SECTION B-SUPPLIES OR SERVICES AND PRICES:

1. DESCRIPTION OF SUPPLIES

The gas supplier (Contractor) shall furnish all necessary labor, materials, tools, equipment, and incidentals to supply and deliver natural gas to the gas meter located at Building 9 on the grounds of the Department of Veterans Affairs Medical Center (VAMC) located in Grand Junction, Colorado. The city gate unit natural gas prices stated in #2 below shall be the sum of the Contractor's unit purchase price, gathering unit cost, and transportation unit cost, including but not limited to gas shrinkage, storage, and fuel charges, Gas Research Institute charge (GRI), Federal Regulatory Commission Annual Cost Adjustment Charge (ACA), all applicable royalties and taxes, and Public Service Company's (PSCo's) transportation charges. The

estimated contract period will be July 1, 2000 through June 30, 2001.

2. OFFER

Offerors shall submit a lump sum price per decatherm of gas under a Transportation firm rate schedule, which reflects the sum of the Contractor's unit purchase price, gathering unit cost and transportation cost, including but not limited to, gas shrinkage, storage, fuel charges, Gas Research Institute charge (GRI, Federal Energy Regulatory Commission Annual Cost Adjustment Charge (ACA), all applicable royalties and taxes, and PSCo's transportation charges.

SECTION C., DESCRIPTION/SPECIFICATIONS:

C-1. BACKGROUND:

The United States Government is seeking alternate sources of natural gas supplies for the Department of Veterans Affairs Medical Center (VAMC), Grand Junction, Colorado, in order to reduce annual purchase gas costs for the Government. This procurement is part of an ongoing effort to review how best to react to marketplace opportunities created by the gas supply imbalance and by the availability of natural gas transportation services and other regulatory changes which offer end users the ability to directly secure lower cost natural gas.

While the Government desires to secure lower cost natural gas supplies, this procurement is being conducted in the context of the important medical functions performed by the VAMC installation and the related desire not to inordinately jeopardize the availability of energy supplies needed to properly conduct these functions. Natural gas service to the VAMC was provided by the Public Service Company of

Colorado (PSCo), Denver, Colorado, pursuant to PSCo's interruptible tariff and service specifications. The quality and reliability of such services is known to the VAMC and, in conjunction with existing dual-fuel capabilities, such as heating fuel oil, etc., has been generally consonant with the VAMC's energy security requirements.

This procurement is for the purchase of wellhead gas supplies and delivery of said gas to the interconnections of the respective pipelines of the Western Natural Gas and Transmission Corporation (WNG) and PSCo, hereinafter referred to as the city gate, for redelivery to the VAMC meter, under the transportation firm rate schedule. The VAMC will take title to the Contractor's gas at the VAMC meter. Contractor will secure transportation of gas from the city gate to the VAMC heating plant. The contractor will perform the month-to-month gas balancing and daily nominations for the VAMC's natural gas requirements.

Paradigm submitted its offer to supply natural gas services at the retail price of \$2.89 per decatherm (Dth). The other offers were \$3.07 and \$3.6293. Contract No. V575P-1632 was entered into on May 10, 2000. (R4, tab 2)

“City gate” is the industry term that denotes the connection of the local distributor’s low-pressure pipeline system with another transporter’s high-pressure system. The interstate pipeline system, which began in 1993, caused natural gas pipeline companies and local distribution companies to alter their rules to facilitate the movement of natural gas owned by third parties, such as a marketer like Paradigm. In 1994, the Public Service Company of Colorado (PSCo), which operates the gas distribution system in Grand Junction that serves the VAMC, was comprised of two entities that transported natural gas: Western Natural Gas and Transmission Corporation (WGN or West Gas) and PSCo distribution (PSCo). West Gas delivered gas to the “city gate” (the point at which

West Gas connected to PSCo) and PSCo moved the gas from the “city gate” to the end user’s burnertip. In 1994, West Gas and PSCo merged which moved the “city gate” back to a point at which natural gas enters the new combined system from other gathering systems and other pipelines. One of the consequences of these altered rules is that since 1994, it has been industry custom and practice that the third party owner of the gas, *i.e.*, such as Paradigm, quotes a price to the “city gate” and the user separately pays the cost of local interruptible transportation of the gas from the “city gate” to its burnertip. (Comp. 8-9; 18-19; 21)

On May 11, 2000, the day after award, Mr. Craig Tate of Paradigm faxed a standard industry contract to Contracting Officer (CO) Denise Boren and requested her to sign it. On May 15, CO Boren advised Mr. Tate that she could sign the “Designation of End User Agent for PSCo Gas Transportation Services” but could not sign the industry contract because VA and Paradigm already had a contract. (R4, tab 4) On May 15, Mr. Tate faxed the PSCo End User Agreement to CO Boren, who signed it. Mr. Tate’s fax transmittal sheet states that “Bonneville Fuels does our back room work. That’s why their name is on it” (R4, tabs 5, 6)

On September 5, 2000 the VAMC received its first bill from Paradigm. On that date CO Boren notified Mr. Tate by telephone that the VAMC believed there was a difference between the amount bid and the amount billed for the service and that the amount bid was “all inclusive.” (R4, tab 7) The parties met on September 11, but no solution was reached. (R4, tab 9) On September 22, Mr. Ed Degan faxed two documents to CO Boren. One was a letter from Joe Naughton, of Naughton Energy, stating that its bid price of \$3.07 did not include the charges of the local utility or local distribution company, PSCo. The second was a letter from Mr. Tate giving Mr. Degan, of Bonneville Fuels, authority to

represent and negotiate on behalf of Paradigm. (R4, tab 10) CO Boren responded by letter on September 26, stating that there was no basis for any negotiating because “we have a firm fixed price contract and Paradigm is required to live up to the terms of the contract.” (R4, tab 11)

On September 28, Paradigm filed a notice of dispute with CO Boren. Paradigm stated that contrary to the VA’s all-inclusive position, its bid was a “city gate” price of \$2.89 and it would secure PSCo’s distribution charges for the VAMC and pass through those charges to VAMC dollar for dollar. Paradigm stated that the Contract “did not truly reflect how transportation of natural gas to end-use customers is done in May 2000, but better reflects gas transportation methods used by PSCo prior to 1994.” (R4, tab 12)

On October 26, CO Boren issued a final decision citing the various provisions of the Contract requiring all costs, including PSCo’s, be included in the bid amount. (R4, tab 14) On January 12, 2001, Appellant filed its Notice of Appeal in which it argues that the correct interpretation of the Contract is that Paradigm charges VAMC the contract price to get gas to the “city gate” and then passes through to VAMC the cost of transporting the gas from the “city gate” to the burnertip. The amount of the PSCo charge was readily available. The VA does not disagree but maintains the two prices were to be submitted as one all inclusive price.

DISCUSSION

Paradigm says it reaches its position because in today’s market gas is taken to end users in Colorado on the PSCo system. “Natural gas is produced from a well, transported on a firm basis to a plant for processing where impurities are removed, and then transported on a firm basis over the gathering system to the

PSCo pipeline; this interconnection is now known as the “city gate” on the PSCo system.” (R4, tab 17) Prior to 1994, processed gas was transported over the WNG system to PSCo where the interconnection between WNG and PSCo was termed the “city gate.” This pre-1994 “city-gate” is the one referred to in Section C of the Contract but the merger of WNG and PSCo changed the meaning of the term “city gate” to the intersection of the gathering pipelines and PSCo, *i.e.*, the point at which gas enters the combined WNG-PSCo system. According to Paradigm, the interconnection of pipeline still denominated as WNG with PSCo is no longer anywhere near the VAMC; gas delivered at that point can flow only to Wyoming. Therefore, Paradigm interpreted the request as pricing delivery at the current “city gate.” (Comp.)

Paradigm avers that Section C-1 of the Contract specifies that the Contractor must “secure transportation of gas from the city-gate to the VAMC heating plant, ” but does not require that the Contractor purchase and pay for that service itself as part of the contract price. Instead, it meant that the Contractor should manage and coordinate the delivery locally and passes on that cost to the VAMC. Because the cost of PSCo's interruptible transportation varies depending upon regulatory events, it is customary in Colorado for the end user to pay this cost as actually incurred. (Comp. P28)

Paradigm argues that its interpretation is supported by Section H (“Special Contract Requirements”) because it highlights the distinction between firm and interruptible transportation. Contract Section H-5 requires that the Contractor “shall provide for all required transportation and delivery services with PSCo.” Accordingly, H-2 requires the contractor to interface with PSCo and make all nominations for transportation service. Section H-3 (“Penalties”) specifies further:

During the term of this contract, should the Contractor make delivery into the PSCo pipeline system, natural gas in excess of the "nominated" amount as determined by H-2., and should such excess deliveries result in a penalty to the VAMC pursuant to the PSCo interruptible transportation tariff, the amount of that penalty shall be deducted (i.e. offset) from payments to the Contractor for future monthly deliveries.

Paradigm concludes its argument by stating in paragraphs 30 and 31 of its Complaint:

30. Thus, the Contract clearly contemplates that the gas will be transported by PSCo on an interruptible basis. This conclusion is further substantiated by Paragraph 2 of Section C-1 (page 3 of 34) in which VAMC pronounces itself comfortable with the level of reliability afforded by the interruptible transportation service it has used in the past.

31. Yet, the Contract Price refers to "a lump sum price per decatherm of gas under a Transportation firm rate schedule" (emphasis in original Section B-2). Because PSCo's firm transportation service is available up to today's city gate, and the Contract called for the use of PSCo's interruptible transportation to take the gas to VAMC's burnertip, Paradigm correctly interpreted the Contract Price to be the cost of bringing gas to today's city gate. Thus, the cost of the additional interruptible transportation is to be borne by VAMC under the Contract.

This interpretation is consistent with industry practice and custom according to the affidavit of Ed Degan, Director of Sales of Natural Gas for Bonneville Fuels Corporation. With the exception of the City and County of Denver, the bids Mr. Degan has prepared for the last ten years have been based

on the price to deliver gas to the city gate, with all the cost of local distribution transportation passed through to the end user dollar for dollar. (Degan Aff.)

The Government's Position Paper states that it is not required to reimburse Paradigm for the PSCo transportation charges. Although not an issue in this dispute, the VA does admit that it is liable for any increase over the \$.409 that Paradigm should have included in its price, if that increase is approved by the Public Utilities Commission of Colorado.

We agree with the VA's position that the Contract required a lump sum price that included the PSCo's transportation charges. While we sympathize with, and can understand how a contractor might make certain assumptions based on a business practice ongoing for over 6 years, the Contract clearly states that the lump sum bid is to the burnertip in Building 9 and the PSCo transportation charges are to be included. The amount of the current PSCo rate was readily available. Paradigm's explanation of how it reached its conclusion that the PSCo transportation charge was to be a separate dollar for dollar pass through ignores the lump sum bid requirement. In addition, when Paradigm realized that the solicitation was using pre-1994 situations, an inappropriate gateway, etc., it had a duty to inquire before concluding that it did not have to include the PSCo transportation charges in its bid.

When a contractor receives an invitation for bid from the Government it is the contractor's obligation to determine what work is involved and to bring any obvious problem, errors or omissions to the Government's attention. When in doubt, a contractor cannot simply guess or choose a course of action but must bring the situation to the contracting officer for resolution. This is true even if the contractor thinks its interpretation is reasonable. *General Elevator Company, Inc.* VABCA Nos. 3666, 3768 93-2 BCA ¶ 25,685.

It is well established that it is the bidder's responsibility to bring patent ambiguities in the specifications and drawings to the contracting officer's attention. When a contract contains a patent ambiguity, the contractor is under a duty to seek clarification, and if no clarification is sought, the contractor cannot later argue that its interpretation is correct. *Grumman Data Systems Corp. v. Dalton*, 88 F.3d 990,997 (Fed. Cir. 1996); *Interwest Construction v. Brown*, 29 F3d 611 (Fed. Cir. 1994). The fact that the problem may arise from the ineptitude of the Government does not entitle the contractor to "bridge the crevasse" in its favor. As the court said in *Beacon Construction Co. v. United States*, 324 F.2d 501, 504 (Ct. Cl. 1963):

We do not mean to rule that ... the contractor must at his peril remove any possible ambiguity prior to bidding; what we do hold is that when he is presented with an obvious omission, inconsistency, or discrepancy of significance, he must consult the Government's representatives if he intends to bridge the crevasse in his own favor.

Appellant has not raised a mistake in bid argument; however, we would be remiss if we did not address it. Courts and Boards have recognized in limited circumstances that if the Government has actual knowledge, or constructive knowledge, that a contractor's bid is based on a mistake, and the Government accepts the bid and awards the contract despite knowledge of this mistake, then the contract may be reformed. *United States v. Hamilton*, 711 F.2d 1038, 1046 (Fed. Cir. 1983) Generally, a contractor may obtain reformation or rescission of the contract only if it establishes that its bid error resulted from a "clear cut clerical or arithmetical error, or a misreading of the specifications." *Liebherr Crane Corp. v. United States*, 810 F.2d 1153, 1157 (Fed. Cir. 1987) If the

contractor's error is not one of the above it is not eligible for reformation or rescission.

In this Appeal, the Contractor has not claimed clerical or arithmetical error. Did Paradigm "misread" the specification when it submitted its bid? We understand how the transportation of natural gas to end-users is contracted for today. We do not understand how or why the location of the city gate and other discrepancies subsequently relied on by Appellant negate the clear requirement that the PSCo transportation charges be included in a lump sum price. An erroneous bid based upon a mistake in judgment does not entitle the contractor to reformation of its contract. *Liebherr*, 810 F.2d at 1157. We have no affirmative assertions as to what went on during the bidding process. Whether Paradigm failed to read the specifications carefully and simply went on current trade practice or went through the reasoning process set forth in subsequent letters and pleadings, it is a clear error in business judgment. As we have noted on previous occasions, the fact that an appeal is submitted on the record does not relieve the party with the burden of proof from providing the Board with sufficient evidence to support its claim. *D. M. Summers, Inc.*, VABCA No. 2750, 89-3 BCA ¶ 22,123; *Southland Construction Co.*, VABCA No. 2579, 89-2 BCA ¶ 21,704; *Jen-Beck Associates*, VABCA Nos. 2107 et al., 87-2 BCA ¶ 19,831

We said in *Schoenfeld Associates*, VABCA Nos. 2104, 2510-17, 87-2 BCA

¶ 19,648 that:

While affidavits, given under oath, carry probative value, the mere allegation in an affidavit without additional explanatory facts or outside substantiation will not necessarily be sufficient to carry the burden of proof. In determining the reliability of conclusory statements, we look at whether there is other corroborative evidence supporting the statement, whether the other facts and circumstances surrounding the allegations make the allegations more believable than not, and to what extent the parties' version of the events and conclusions differ or can be reconciled. In weighing these elements, however, the moving party's position must be more reliable than its adversary in order for us to find in its favor. See *ACS Construction Company, Inc.*, ASBCA Nos. 28193 and 28666, 86-1 BCA ¶ 18,627; *Bruce-Anderson, Co., Inc.*, ASBCA No. 28099, 84-1 BCA ¶ 17,177.

The parties . . . by electing a Rule 11 proceeding, took upon themselves the responsibility to provide this Board with adequate evidence upon which to make a finding in their favor.

Even if we give Paradigm the benefit of the doubt on the misread/judgment area, the VA must have actual or constructive notice of the mistake. Appellant has not offered any evidence on this issue thus we are left with the limited record before us. The offers were \$2.89 and \$3.07 from the two offerors alleging they left out the PSCo transportation charges. The remaining offer was \$3.6293. (R4, tab 1) During the bid submission process, the Government has a duty to examine bids for mistakes. When the CO has reason to believe that a bid is erroneous, the CO is required to request from the bidder a verification of the bid, calling attention to the suspected mistake.

(48 C.F.R. § 14.407-1) This duty only pertains to errors contained in the bid and does not extend to the contractor's subsequent filings. *McClure Elec. Constructors, Inc. v. Dalton*, 132 F.3d 709, 710 (Fed. Cir. 1997); 48 CFR § 14.407 There is nothing in the Record before us that indicates the CO had constructive knowledge based on the disparity of bids. In the Record there is an undated, unrefuted report of contact from Robert Ridout, Chief, PTL, that states he attended the bid opening and discussed with Appellant's unnamed representative, the requirement for an all inclusive bid price. The report also states "I noted that the bid price was the same as the current contract to deliver gas to the boiler plant." (R4, Tab 3) Thus, it does not appear that the CO was on notice of a mistake in Paradigm's bid.

DECISION

For the foregoing reasons the Appeal is denied.

DATE: **May 5, 2001**

WILLIAM E. THOMAS
Administrative Judge